IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT,

Respondent.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief for Petitioners.

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.

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REVIEW OF STATEMENT AS MADE BY RESPONDENT.

Respondent's brief states (Respondent's brief, p. 3) that whenever one of the crew failed to show up, he "would be replaced by someone picked up at random (R. 42)." This is an inference drawn by respondent, which we believe to be in error. The evidence is uncontradicted that the deceased, John Schumann, had been continuously a regular member of the crew from October 15 to October 31, 1937 (R. 9). The master of the vessel was interrogated hypothetically how he would have replaced Schumann or any other member of the crew if one of them failed to show

up for duty, and the master said he would have to make up his full crew before he could operate his ship. If necessary, he would call up the Inspectors for permission to operate with a short crew. The place to which he would have resort to replace a member of the crew, if necessary, would be on the dock or wherever they could be secured (R. 42). The testimony was purely hypothetical as to what would be done in an emergency and the sources from which members of the crew would be secured. As sailors invariably hang around docks, that would be the natural place to find one, and the witness did not state that they were picked up "at random."

The Premises of Respondent's Brief Are Not Well Taken.

The brief of respondent is predicated throughout upon the premise that the issue of crew membership "should be regarded as one of fact" (Respondent's brief, p. 11).

This primary assumption is unsound.

The Court of Appeals held, as we contend, that "the facts are not in dispute" (R. 91). The Court of Appeals says that the single question in the case is whether or not "deceased was a seaman consistent with the undisputed facts" (R. 92).

As we view Respondent's brief, we believe counsel have themselves summed up their brief in two statements therein contained:

> *First.* "In this view the question of what general standard must be applied in determining who is a 'member of a crew' would seem clearly to be a question to be decided by the courts. That is a question of law. It is the Government's position, however, that the application of the general standards laid down in

the decisions to the circumstances of individual cases should be treated as a question of fact for the determination of the deputy commissioner'' (Respondent's brief, p. 12).

As the facts in the case at bar are entirely without dispute, the determination, whether such undisputed facts make the claim for compensation one over a claim of which the deputy commissioner has jurisdiction and power to make an award or not, must of necessity present a case on which the court has the power to reach a conclusion as a matter of law. To hold otherwise would be to say that there is a hypothetical power in the courts to review a case where the jurisdiction or power of the commissioner is challenged, but that in no case could the power of the courts be practically exercised.

Second. Counsel for respondent adopt the premise in their brief that a determination of the court under undisputed evidence that the deputy commissioner had no jurisdiction or power to make any award is, in effect, ''substituting the judgment of the courts for that of the deputy commissioner'' (Brief of Respondent, p. 36).

We respectfully submit that the issue is not one of *substitution* of judgment, for if the courts have the power to declare the standard to be applied in determining who is a member of a crew (Respondent's Brief, p. 12), then a determination under undisputed evidence whether or not a case falls within or without that standard is the province of a court not unlike the power to direct a verdict under undisputed evidence. In truth, the power of the court is greater on the issue here presented than here last mentioned, for we assert that the question goes to the existence of any power on the part of a deputy commissioner to make an award under undisputed facts and, therefore, the

question is one which, under the decisions, the court may independently examine under both the law and the facts.

"The Meaning of the Term 'Member of a Crew' ".

(Respondent's Brief, pp. 12-15)

Respondent cites cases to the effect that sometimes the master is included and other times excluded from the ship's company when the term "crew" is employed (Respondent's brief, p. 13). Such differing uses of the term are not of importance in this case because the statute itself distinguishes between the master and members of a crew, excluding both from the operations of the Longshoremen's Act and, therefore, such otherwise possible confusion of terms is precluded by the language of the Act itself.

Respondent concedes that cooks, engineers, wireless operators or even bartenders may be members of the crew of a vessel (Respondent's brief, p. 14). These cases serve, in our judgment, to demonstrate that the test is *not the duties performed* by a person as a criterion for inclusion or exclusion from the ship's company, but the standard is his status, *i. e.* whether he is a part of the ship's company, the presence of whom is required to make it a vessel entitled to engage in its business.

But respondent says that there is a class of workers who fall in "the 'twilight' zone" (Respondent's brief, pp. 14-15).

Respondent cites language from the case of *Scheffler* v. *Moran Towing & Transportation Company*, 68 F. (2d) 11, which was directed exclusively to the point of assumption of risk by an employe of shorthandedness of a tug, and it is stated that exemption from assumption of risk because

unseaworthiness, although not available as against a aman on the seas, is not an excuse to those "who, though rictly speaking they are seamen, are employed upon har- r craft." Nor does the exemption from assumption of sk apply in all cases to seamen on the high seas, for even to them the exemption "does not, however, excuse him nen he has an alternative" (p. 12). It is obvious that e court in the case cited did not hold that deck hands harbor craft were not seamen, but asserts that even ough *they are seamen*, they, like those on the high seas they have no alternative to living with the perils which nfront them, are exempted from assumption of risk. ne case is not authority for any contention that a seaman a harbor craft is not a member of a crew of a vessel.

In the brief of respondent it is stated that "The prin- ples governing the division of function of court and jury rnish a persuasive analogy" (Respondent's brief, p. 25 *seq.*). In this division of the brief of respondent, it is ntended that whether a company of persons is a crew or not a crew of a vessel presents a question of fact. Quo- tion is made from *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 0 (Brief of Respondent, p. 25). In that case the question r determination was stated by Mr. Justice Story (as oted by respondent):

"What is a competent crew for the voyage?"

ne competency of the crew resting in nautical testimony esents a problem entirely variant from that here pre- nted, which is *membership* in a crew regardless of the alities or aptitude of the members of the crew.

Respondent quotes at length from *Pearce* v. *Lansdowne*, L. J. R. (N. S.) (Q. B. Div. 1893) 441, and another port of opinion of the same case, 69 L. T. R. 316 (Brief Respondent, pp. 25-26).

The facts in the case so cited are not completely stated by Respondent and we regard the following additional facts as of importance:

The action was under The Employers and Workmen Act, 1875, s. 10, which provided for compensation to a workman, the Act itself providing "'the expression "'workman" does not include a domestic or menial servant, * * *'" (p. 441, the first of two foregoing citations.)

It further appears from the statement of facts preceding the opinion in the foregoing case as respects the claimant: "He lived at his own house and went home three times a day for his meals. The defendant's residence was the public-house in question." (p. 441.)

The essence of the opinion is stated in the following quotation:

> "However, under the present circumstances, where the Court feels that they have all the facts before them calculated to enable them to give judgment and finally settle the matter, such judgment may be properly given." (p. 443.)

Two questions were presented as to the claimant in that case whether he was a domestic servant and whether he was a menial servant. The question of whether he was a domestic servant did not turn upon whether he lived on the premises or resided elsewhere, although it might be important in other cases, and the Court stating that while it might be a material circumstance under some hypothetical cases, nevertheless:

> "If my view of the present case is the right one, it appears to me that the personal residence of the defendant at his public-house is a cogent reason why a jury should decide that the plaintiff's employment

was that of a domestic servant. I think, too, that the facts show that the plaintiff was substantially occupied as a domestic."

So, in the case at bar, if the skill of Schumann, or the gree of his seamanship or his qualifications to perform e duties of an able seaman were involved in the deci-on, a different question would be presented.

All that the statute prescribes as a condition for exapting the employee from the right to assert compensaon or the duty of the vessel to pay him compensation is at he be a "member of the crew of any vessel." It is disputed that the Koal Kraft was a vessel; that she d a crew; that Schumann was one of that crew. Whether s duties were light or heavy, skillfully or unskillfully ndered are of no importance. As in *Pearce* v. *Landsowne, supra,* it was said (p. 444):

"It seems plain, however, that the reason for their exclusion was in no way connected with the work they had to do, whether it were light or heavy, skilled or unskilled, but rather that where *relations* were of so domestic a nature as those which exist between a master and the servants of his household, servants standing in such a relationship to their employers were not to be included in its scope" (Italics ours).

So in the case at bar, it was the relationship of Schuann to the ship as a member of its crew that is the dermining factor and not his skill or lack of it or the uties to which he might be assigned as a member of the ip's company.

Cases under Longshoremen's Act Cited by Respondent Are Not Authority against Our Position.

(Brief for Respondent, pp. 22, 31)

Respondent cites three cases at p. 22 and one case at p. 31, arising under the Longshoremen's Act, having more or less pertinency to the issues here presented (Respondent's Brief, pp. 22, 31). These cases are cited to the point that "no rule of law has or can be evolved which will substantially eliminate uncertainty as to whether a person is a 'member of a crew'" (Respondent's Brief, p. 22). This statement must be read in conjunction with the statement by Respondent that the standards for determining who is a member of a crew "would seem clearly to be a question to be decided by the courts, that is, a question of law" (Respondent's Brief, p. 12).

In reviewing the four cases cited by respondent [*Lawson, Deputy Commissioner* v. *Maryland Casualty Co.*, 94 F. (2d) 193; *Diomede* v. *Lowe*, 87 F. (2d) 296; *De Wald* v. *Baltimore & O. R. Co.*, 71 F. (2d) 810; and *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245)], to make our discussion intelligible, it is appropriate and, we trust, helpful to the Court to recite the provisions of the statutes incidentally bearing on what is a vessel within the meaning of the statute and what is a crew within the general intent of the statute.

The steamer, Koal Kraft, was a vessel of 312 net tons burden, 159 feet in length, 37 feet beam, and 10 feet draft (R. 14). The Petitioner's original brief called attention to various statutes disclosing such a vessel was subject to inspection, certification and designation of make-up of its crew. We call attention to the following additional statutory requirements and classifications of vessels disclosing as we assert that the Koal Kraft was a vessel

within the statutory intent, whereas the vessels in the cases cited by respondent were not.

The provisions relating to measurement of vessels applies only to vessels required by law to be registered or enrolled or licensed. (Rev. Stat. 4152, U. S. C. A., Title 46, Sec. 76.)

A licensed vessel of the United States entitled to engage in the coasting trade is an enrolled vessel of twenty tons and upward, duly licensed, or a vessel of less than twenty tons having a license in force. (Rev. Stat. 4311, U. S. C. A., Title 46, Sec. 251.)

The provisions as to licensing and enrollment apply to vessels of more than twenty tons. Vessels between five tons and twenty tons burden are not required to be remeasured in the absence of changes since former measurement. (Rev. Stat. Sec. 4331, U. S. C. A., Title 46, Sec. 273.)

Provisions for registering, enrolling or licensing vessels are not applicable and the statute governing registry or enrollment or licensing do not apply to "the enrolling, registering or licensing of any flatboat, barge or like craft for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States." (21 Stat. 44, U. S. C. A., Title 46, Sec. 332.)

"All vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid, naphtha or electric motors, are subject to all the provisions of Sec. 404 relating to the inspection of hulls and boilers and requiring engineers and pilots * * *." (29 Stat. 489, U. S. C. A., Title 46, Sec. 520.)

The last foregoing section is probably superseded by Rev. Stat., Sec. 4426, U. S. C. A., Title 46, Sec. 404, which

applies to canal boats, etc., "or other small craft of like character propelled by steam," in which it is provided that "no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer." The same section provides that all vessels of the small type above fifteen gross tons carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, shall be subject to inspection of hulls and boilers.

The Great Lakes and tributary waters in the Lake Michigan area are expressly placed under jurisdiction of vessel inspectors, and the provisions as to enrolling and licensing such vessels extend to vessels enrolled to navigate in those waters. (44 Stat. 832, U. S. C. A., Title 46, Sec. 293b (1938 Cumulative Annual Pocket)).

In *Lawson, Deputy Commissioner* v. *Maryland Casualty Co.*, 94 F. (2d) 193, the vessel was a rowboat less than 16 feet long, propelled by one oar at its stern, and the Court properly held that it was not a vessel within the intent of the Act (p. 194). It was further held that the skiff was not a vessel and that the dredge in connection with which it worked was not a vessel to which the deceased was so assigned as to be a member of its crew, as he worked primarily under the direction of a labor foreman on land (p. 194).

In the case of *Diomede* v. *Lowe, Deputy Commissioner*, 87 F. (2d) 296, the supposed vessel was a dump scow "without means of self-propulsion" (p. 297), it had no ship's company but "the decedent was the only person working on the scow" (p. 297) and being the only person on the ship, there was no crew in any proper or legal sense.

In *De Wald* v. *Baltimore & O. R. Co.*, 71 F. (2d) 810, the deceased was employed on a barge having no motive power (p. 811). He was the only person employed on it and the court held that he was not a member of the crew because the term "'crew' is a collective noun" and implies more than one person (p. 813). The court might well have held that the barge was not a vessel had its attention been called to the statutes which we have noted above. No decision on this point was made by the court.

In *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245, the vessel involved was a launch not described as to size or tonnage (p. 245). Its supposed crew, other than its captain, consisted of the decedent alone (p. 245). Not only was he not a member of a ship's company because he was the sole person on her but furthermore he was not employed by or under the direction of the captain of the launch, but worked under shore officials of the dry dock company (p. 247). It may be fairly be said that the launch in question was not shown to be a vessel and that the deceased was not a member of a ship's company.

The foregoing are the only cases cited by respondent apparently asserted as arising under this Act in throwing any special light on the questions here involved.

We respectfully submit that none of the cases cited is any authority against our contentions. Respondent is forced by necessity to the position either that the Koal Kraft was not a vessel of the United States or that the persons forming the ship's company on her were not a ship's crew. That the Koal Kraft was a vessel of the United States is not only undisputed on this record but was expressly stipulated (R. 61). Her size and tonnage were proven (R. 14); the membership of her crew was prescribed by vessel inspectors and included "3 seamen" of whom the deceased was one (R. 65). It is uncontra-

dicted and so noted in the opinion of the Court of Appeals that the necessary ship's company would not exist unless Schumann were included (R. 91) and the only point of distinction the Court of Appeals could make was that the designation of this crew in the inspection certificates (it was said) had a different significance and connotation than is used in the statutory exception (R. 91).

Respondent is relegated to the position that one performing the duties of Schumann would be a member of the crew if the vessel traveled from Illinois to Michigan but that he would not be a member of the crew when traveling from Illinois to Indiana or in the Indiana harbor; the vessel being engaged in commerce, enrolled, and having its crew prescribed by law, the accidental fact that the vessel traveled to the port of another state or remained in the harbor is not any point of distinction made by the statute which exempts every master and every member of a crew of a vessel. If the logic of the Court of Appeals were to be pursued it would mean that the master likewise was subject to the Compensation Act for he likewise remained on this vessel only while in Illinois water or traveling between Illinois and the adjoining state of Indiana. It cannot be true that when he navigated the vessel in Calumet Harbor he was not a master of a vessel but that if he navigated the same vessel to St. Joseph, Michigan—only a few hours distant—he would then rise to the dignity of a master of a vessel merely because his vessel touched a different port. At one time he would supposedly be under the Compensation Act and at another time he would not be. If he were injured at one time he would recover compensation, if injured at another time, he would not. The standard must necessarily be that a person who becomes so identified with the ship that he and the others associated with him perform the functions of operating it and are

subject only to the will of the master of that ship are members of the crew of the vessel while the vessel is engaged in commerce, and their category as members of the crew is fixed by their relationship to the ship, which does not change so as to come within the Compensation Act or without the Act dependent upon the ship preceding a few miles more or a few miles less upon its trips. It is the identity of a person with a ship so that he is a part of it like its anchor, its sails, etc., which makes him a member of the crew. Whether the duties he performs are heavy or light, skilled or unskilled, whether he be waiter, bartender, fireman or deck hand, he is a member of the crew if his presence is one of the necessities of operating the ship in whatever activity on the water the ship be engaged.

The Court should not become confused by cases of watchmen, etc. upon ships out of commission, for they by, reason of want of a crew etc. become mere hulls and unfit to run as if a sailing vessel were moored and had no sails aboard by which it might be sailed.

We respectfully submit that this case permits only one conclusion upon undisputed facts, that the decree of the District Court ought to stand and the reversal by the Circuit Court of Appeals should be set aside.

Respectfully submitted,

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.